No. 86-289

Supreme Court, U.S.
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In The Supreme Court of the United States

OCTOBER TERM, 1986

DAISEY EALEY, Personal Representative of the Estate of J. C. EALEY, JR., Deceased, et al.,
Petitioners,

v.

THE CITY OF DETROIT and COMMANDER PHILLIP ARREOLA, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

RESPONDENTS' BRIEF IN OPPOSITION

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v.

THE CITY OF DETROIT and COMMANDER PHILLIP ARREOLA, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

Respondents, the City of Detroit and Commander Phillip Arreola, respectfully request that this Court deny the Petition for Writ of Certiorari, which seeks review of the decision of the Michigan Court of Appeals, reported at 144 Mich App 324; 375 NW 2d 435 (1985).

JURISDICTION

This Court's jurisdiction to review the decision of the Michigan Court of Appeals extends only to federal questions raised in, and necessarily decided by, the Michigan State Courts. This Court does not have jurisdiction to review the questions presented by Petitioners.

Petitioners never raised their equal protection argument in the state courts, nor did the Michigan Courts decide the issue. Petitioners also did not raise their due process/directed verdict contention before the Michigan Courts. Furthermore, the directed verdict issue is a matter of state, not federal, law.

STATEMENT OF THE CASE

Early on December 11, 1979, Audrey Spears walked toward a residence in the City of Detroit. As she reached the front door, a man, later identified as J. C. Ealey, Jr., approached her from the side of the house and pointed a rifle directly at her. He then waved it back and forth at her, saying that someone was after him. Ealey followed her onto the front porch still waving the rifle. Ms. Spears entered the house, leaving Ealey on the porch.

Once in the house, she observed Ealey "laying on the porch up against the wall" with the rifle pointed at the front outside door. She then called the police regarding this unknown gunman.

At approximately 7:15 A.M. Police Officers Patrick Fitzgerald and Gary Bessinger responded to a radio call about Ealey. From a distance, they observed Ealey on the porch pointing his rifle directly at them. They called for backup assistance.

Commander Phillip Arreola responded at approximately 7:24 A.M. and was informed of the situation. The Commander went to the back of the house where he met an "hysterical" Audrey Spears. She told him there was a "crazy man on the porch with a rifle." Commander Arreola evacuated the occupants of the house.

The Commander then entered the house where he observed Ealey through the windows between the living room and the

front porch. Ealey held his rifle in a ready position pointed at the outside door. The Commander then left the house to obtain the assistance of Officer Fitzgerald. Commander Arreola issued an order for maximum cover for all other responding units. The Commander and Officer Fitzgerald then returned to the living room of the house to observe Ealey.

The Commander positioned himself at the west end of the living room, in the vicinity of the front door, where he could observe the unidentified gunman. Ealey was still on the east side of the front porch. Officer Fitzgerald remained on the east end of the living room watching Ealey from behind curtained windows. At this point Ealey held his rifle in a "shooting position," with the gun 'up in his shoulder aimed in a westerly direction."

The two officers continued to watch Ealey as they waited for the arrival of additional equipment. Suddenly, Ealey stood and pointed his weapon in a northerly direction at the street. Commander Arreola, fearing that Ealey was going to fire at a policeman or a civilian out in the street, opened the door from the living room leading into the porch to distract the gunman.

As the Commander opened the door to the porch, he yelled "police, drop your gun." When the gunman did not drop his rifle, Commander Arreola said "you have one gun at your back and one at your side, drop your gun." The gunman then spun towards Commander Arreola, pointing his loaded rifle at him.

Officer Fitzgerald heard the orders given by the Commander and watched as Ealey turned and aimed his gun at the Commander. At that moment, Officer Fitzgerald was convinced that Commander Arreola's life was in danger. Fitzgerald immediately broke the front window pane with his gun and fist and rapidly fired six shots at Ealey in approximately a second and a half. At the same moment, with a loaded rifle

pointed at him five to eight feet away, Commander Arreola "instinctively" fired five rapid shots at Ealey.

Ealey was struck by the bullets and fell to the floor. Commander Arreola immediately called for EMS assistance and notified the other officers of the situation. The ambulance arrived within minutes and transported Ealey to Henry Ford Hospital, where he died of these wounds.

On March 30, 1980, Petitioners filed suit in Wayne County Circuit Court. Trial by jury commenced on March 2, 1983 with the Honorable Helene N. White presiding. At the close of Petitioners' proofs, Respondents moved for Directed Verdict, which was denied by Judge White. On March 11, 1983 a jury verdict was returned.

On December 8, 1983, Respondents filed an Application for Delayed Appeal to the Court of Appeals. The Application was granted on April 27, 1984 and a Claim of Appeal was filed on May 17, 1984.

On July 16, 1984, the Michigan Court of Appeals issued its Opinion reversing the trial court. The Court of Appeals concluded that Respondents' Motion for Directed Verdict should have been granted because Commander Arreola acted in good faith to defend himself.

On August 6, 1985, Petitioners filed an Application for Leave to Appeal with the Michigan Supreme Court. The Supreme Court denied Leave on March 26, 1986, and denied a Motion for Reconsideration on May 28, 1986.

REASONS FOR DENYING THE WRIT

I.

THIS HONORABLE COURT SHOULD NOT GRANT A WRIT OF CERTIORARI BECAUSE PETITIONERS DID NOT RAISE THE EQUAL PROTECTION ISSUE IN THE MICHIGAN COURTS, BECAUSE THE MICHIGAN COURTS DID NOT RULE ON THE PARENTAL RIGHTS ISSUE, AND BECAUSE THE COURT OF APPEALS' DISCUSSION OF PARENTAL RIGHTS WAS LEGALLY CORRECT.

A. This Court should not hear Petitioners' equal protection argument, as Petitioners never raised that claim before the Michigan Courts.

This Honorable Court's jurisdiction to review state court decisions, under 28 U.S.C. § 1257 (1982), does not extend to cases in which the federal questions sought to be reviewed were neither raised in, nor decided by, the state courts. This Court's Rules require that a Petition for Certiorari contain a precise delineation of the manner and timing of the raising of the federal question in the state courts. Supreme Court Rule 21.1(h) provides:

> "If review of the judgment of a state court is sought, the statement of the case shall also *specify the stage in the proceedings*, both in the court of first instance and in the appellate court, *at which the federal questions sought to be reviewed were raised*; the method or manner of raising them and *the way in which they were passed upon by the courts*; such pertinent *quotation of specific portions of the record*, or summary thereof, where *specific references* to the places in the record where the matter appears . . . as will show that *the federal*

> *question was timely and properly raised so as to give this Court jurisdiction to review the judgment* on writ of certiorari." (Emphasis added).

This rule is predicated on sound jurisdictional and prudential considerations.

The requirement that the state court decide federal constitutional questions in the first instance promotes the development of an adequate record, ripe for Supreme Court review. *Illinois* v. *Gates*, 462 US 213, 221 (1983)(citing *Cardinale* v. *Louisiana*, 394 US 437, 439 (1969)); *Hill* v. *California*, 401 US 797, 805 (1971). In addition, "'due regard for the appropriate relationship of this Court to state courts,'...demands that those courts be given an opportunity to consider the constitutionality of the actions of state officials...." *Gates*, 462 US at 221 (citation omitted). Finally, the state courts should be given full opportunity to rest the decision on independent and adequate state grounds. *Id* at 222; see *Webb* v. *Webb*, 451 US 493, 499 (1981).

In a long series of cases, this Court has consistently denied its jurisdiction where the petitioner raised the federal question for the first time before this Court. In *Beck* v. *Washington*, 369 US 541 (1962), this Court refused to hear petitioner's challenge to a Washington statute on equal protection grounds. The Court noted that, although given the opportunity to do so, petitioner did not raise the equal protection argument before the Washington State Courts. The Washington Supreme Court did not decide that argument, nor did petitioner raise it in his petitions for rehearing to that Court. In *Stanley* v. *Illinois*, 405 US 645 (1972), cited by Petitioners, this Court observed that it would not have jurisdiction over a case in the exact procedural posture as the instant case:

> "In [*Picard* v. *Connor*, 404 US 270 (1971)] *a due process, rather than an equal protection, claim was raised in the state courts*. The federal courts were, in our opinion, barred

> from reversing the state conviction on grounds of contravention of the Equal Protection Clause when that clause had not been referred to for consideration by the state authorities. Here, in contrast, we dispose of the case on the constitutional premise raised below, reaching the result by a method of analysis readily available to the state court. For the same reason the strictures of *Cardinale* v. *Louisiana*. . . and *Hill* v. *California*. . . have been fully observed." *Stanley*, 405 US at 658, n. 10. (Emphasis added, citations omitted).

See *McGoldrick, Comptroller of the City of New York* v. *Compagnie Generale Transatlantique*, 309 US 430, 434-35 (1940); *Bowe* v. *Scott*, 233 US 658, 664-65 (1914).

In the instant case, the precise question that Petitioners seek to have this Court review is, whether allowing the parents of a minor child to bring an action for the deprivation of their constitutional rights to the continued life of their child under 42 U.S.C. § 1983 (1982), while not allowing the parents of an adult child to bring such an action, violates the equal protection clause of the Fourteenth Amendment. Petitioners, however, never raised this argument before the Michigan Courts.

Contrary to Supreme Court Rule 21.1(h), the Statement of the Case in the Petition does not specify where, nor how, Petitioners raised the equal protection argument in the state courts, nor the way in which the state courts decided that argument. Petitioners do state that "[t]he Michigan Court of Appeals also ruled that the parents of an adult child have no constitutionally protected rights for the continued life of their adult child under 42 U.S.C. Sec. 1983." Pet. for Cert., at 7.[1]

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[1] Petitioners' characterizaton of the Michigan Court of Appeals' decision is erroneous. The Court's discussion of the constitutional rights of the parents of an adult child to the continued life of that child is dictum. *Ealey* v. *City of Detroit*, 144 Mich App 324, 337; 375 NW 2d 435 (1985).

Ironically, before the Michigan Court of Appeals, *Petitioners* argued that the issue — whether the parents of an adult child may maintain an action under § 1983 — was *not* preserved for appeal by Respondents in this case. (Plaintiff-Appellees' Cross-Appellants' Brief on Appeal, at 26-27).

In their Application for Leave to Appeal to the Michigan Supreme Court, *Petitioners* again contended that the issue was not properly preserved for appeal. Further, Petitioners argued *only* about the existence of parental rights, not about equal protection: "[t]here is a constitutionally protected right to one's own life, and there is a constitutionally protected right to the life of one's child." (Brief in Support of Application for Leave to Appeal, at 22). Petitioners limited their arguments to whether the due process clause guarantees parents the right to the continued life of adult children. (Application for Leave to Appeal, at 5-6). Finally, in their Motion for Reconsideration of Application for Leave to Appeal, Petitioners only raised a question of governmental immunity. Nowhere in their Court of Appeals' pleadings, nor in their Application for Leave to Appeal to the Supreme Court of Michigan, nor in their Motion for Reconsideration in that Court, did Petitioners argue that the decision of the Michigan Court of Appeals violated the equal protection clause of the Fourteenth Amendment.

This Court has no jurisdiction to review state court decisions in which federal questions were never raised. Respondents urge this Honorable Court to deny the Petition for Writ of Certiorari to the Michigan Court of Appeals.

B. This Court should not review the discussion of the parental rights issue by the Michigan Court of Appeals as such discussion was dictum.

This Court's jurisdiction to review decisions of the state courts extends only to those cases where the state courts *necessarily decided* the federal question. Sup. Ct. R. 21.1(h); *Beck*, 369 US at 552-54; *Bowe*, 233 US at 663. Where, as here, the state court did not decide the particular federal question sought to be reviewed, this Court should not grant the Petition for Writ of Certiorari.

In the instant case, the Michigan Court of Appeals never decided whether the parents of an adult child have a constitutionally protected right to the continued life of that child. Petitioners claim that "[t]he Michigan Court of Appeals *also ruled* that the parents of an adult child have no constitutionally protected rights for the continued life of their adult child under 42 USC Sec. 1983." Pet. for Cert., at 7. (Emphasis added.) However, Petitioners' portrayal of the decision of the Court of Appeals is inaccurate.

The Court limited its holding to a determination that the trial court should have granted a directed verdict in favor of Respondents because Commander Arreola acted in good faith in defending himself from J. C. Ealey, Jr. 144 Mich App at 335.[2] The Court of Appeals found that the evidence in the case pointed only to the good faith with which Commander Arreola acted. The Court held that a finding of good faith provides a complete defense to both civil rights and state tort law claims, citing *Harris* v. *Pirch*, 677 F 2d 681, 686 (8th Cir. 1982); and *People* v. *Joeseype Johnson*, 75 Mich App 337, 342; 254 NW 2d 667 (1977), *lv. den.* (private security guard may meet deadly force with deadly force). 144 Mich App. at 332.

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[2] The Court's decision to reverse the trial court's denial of the Motion for Directed Verdict is discussed in more detail in Section II.C., *infra*.

Because the Court of Appeals determined that Commander Arreola and Officer Fitzgerald had acted in good faith and, therefore, that Respondents should have been granted a directed verdict, the Court did not need to reach the question whether Ealey's parents had a constitutional right to the continued life of their adult son. The existence of such a right was irrelevant, as no violation of said right had occurred. The Court itself recognized its discussion of parental rights as dictum:

> "Having found in this transcript only evidence of a good faith and reasonable belief on behalf of Arreola, we must reverse the trial court's failure to grant a directed verdict . . . As far as whether or not damages of $240,000 is so excessive as to shock the judicial conscience, . . . we need make no determination as *we are reversing the granting of any judgment*.
>
> *While not necessary to this opinion we do consider other issues* . . ." 144 Mich App at 337 (Emphasis added, citation omitted).

The Court then immediately discussed the parental rights issue.

The discussion of that issue by the Court of Appeals was dictum. This Court should deny the Petition in the instant case, because this Court does not have jurisdiction to review state court decisions where the state court did not necessarily decide the federal question.

C. The parents of J. C. Ealey, Jr. do not have any constitutionally protected rights to the continued life of their adult son.

Parents do not have constitutional rights to the continued life of their child, where that child's death resulted from a single isolated action of a government official. Petitioners have not shown that *they*, as parents, possess any constitutionally protected rights to the continued life of their son. Such showing of injury to *their own* rights is a prerequisite to the award of damages under § 1983. *Evain* v. *Conlisk*, 364 F Supp 1188, 1190–91 (N.D. Ill. 1973), *aff'd*, 498 F 2d 1403 (7th Cir. 1974).

The particular right claimed by Petitioners does not exist. In *Jackson* v. *Marsh*, 551 F Supp 1091 (D. Colo. 1982), the parents of a child shot by a police officer brought suit in part under § 1983, seeking redress for violation of *their* constitutional rights. The Court held that the parents did not have any fundamental constitutional rights to the continued life of that child. *Id* at 1093; *White* v. *Talboys*, 573 F Supp 49, 51 (D. Colo. 1983).

The *Jackson* Court stated that this Court's pronouncements on familial rights proscribe broad-based governmental action, not isolated actions of individual government officers:

> "In my judgment, the parental or family right with which we deal is simply the right to be free *from pervasive, broadly-focused governmental activity directed at the family units in the community as a whole or applicable to all families within the purview of the governmental entity. Conversely, the Supreme Court has never addressed, nor has it created, a right of a constitutional magnitude which protects individuals from particular acts of governmental agents focusing upon specific family members and potentially affecting the continuity of the intrafamily relationship.*

> Individuals who have been subject to those acts are not without redress; however, as I see their right, it is not one protected by the United States Constitution in the manner which would make it cognizable under § 1983. In short, any right arising out of facts such as those before me in this case must be pursued in state court." 551 F Supp at 1094. (Emphasis added.)

In the specific factual setting of this case, where the alleged deprivation of parental rights occurs because of the individual actions of a particular officer of the state, the Constitution does not provide parents with rights to the continued life of a child.

The cases cited by Petitioners do not demonstrate the existence of such a right. In *Stanley*, 405 US 645 (1972), this Court rested its decision to overturn an Illinois custody statute on the disparate treatment of unwed fathers as individuals. See *Jackson*, 551 F Supp at 1093-94 & n. 5 (if wed and unwed fathers were both denied a hearing under the Illinois statute, no constitutional question would have been raised in *Stanley*). In *Little* v. *Streater*, 452 US 1 (1981), this Court held that the state must not deny blood tests for an indigent putative father because of the pecuniary and liberty interests involved.[3] In *Lassiter*, 452 US 18 (1981), this Court held that petitioner was not denied due process because of the trial court's failure to appoint an attorney for her. *Id* at 33. In addition, this Court recognized

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[3] A finding of fatherhood would result in substantial support obligations. Failure to provide support could result in a jail sentence. 452 US at 11-12. This Court's discussion of the importance of the family was dictum. Further, this Court stated that *Stanley* and *Lassiter* v. *Department of Social Services*, 452 US 18 (1981) merely require *procedural*, not substantive, due process and fairness. Petitioners have never demonstrated how the actions of Commander Arreola have denied them any procedural fairness in their capacity *as parents*. The Michigan Court of Appeals holding that J. C. Ealey, Jr. was not denied any rights affirms that the parents were not denied any procedural rights. 144 Mich App at 335-36.

that any parental rights were limited to an interest in the accuracy and justice of a termination decision, an interest shared by the state.[4] In *Smith* v. *Organization of Foster Families*, 431 US 816 (1977), this Court held only that foster families do not have Fourteenth Amendment interests because such families are state-created entities. None of these cases support Petitioners' claim that parents have rights to the continued life of a child against the actions of an individual government officer.

Petitioners cite *Bell* v. *City of Milwaukee*, 746 F 2d 1205 (7th Cir. 1984), and *Kelson* v. *Springfield*, 767 F 2d 651 (9th Cir. 1985), for the proposition that the age of the decedent is irrelevant to the existence of parental rights. Pet. for Cert., at 8–10. The *Bell* case is inapplicable to the case at bar. In delineating the nature of the parental rights, the Court noted that the father's constitutional right was hinged upon the right to raise, educate, and generally control the child. *Id* at 1246–47. In the instant case, J. C. Ealey, Jr. had not lived at home for 14 or 15 years. J. C. Ealey, Jr.'s parents did not have the kind of interest in educating or controlling him to establish the existence of constitutional rights. 144 Mich App at 337.

Furthermore, *Kelson* is also distinguishable from the instant case. *Kelson* involved the death of a 14 year old son, not an adult one. The Court in *Kelson* implicitly recognized that the determination of parental rights is a peculiarly *factual* one. 767 F 2d at 655 n. 3.

As noted by the Court in *Bell*, any possible constitutionally protected rights of parents stem from their interest in raising

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[4] In the instant case, the Michigan Court of Appeals correctly decided that Commander Arreola properly shot J. C. Ealey, Jr. Given this result, no possible parental rights could arise under the *Lassiter* analysis. Further, in the instant case, the state interest would be different than that of Petitioners. The state has a very strong interest in law enforcement, an interest not necessarily shared by Petitioners.

and nurturing a child. Once a child leaves home and starts a life of his own, the parents no longer have an interest in his raising and nurturing. In the instant case, the Court of Appeals recognized this legitimate distinction:

> "The decedent was 34 years of age. He had been unemployed and supported by general assistance. He had not lived with his parents for 14 or 15 years and had contributed but little financial support to his parents even when he briefly returned home during his adult years. . . There is a serious issue as to whether or not parents of a 34-year-old man who was living and has lived away from his parents' home nearly all of his life since he was 20 have been deprived of a federally-protected civil right by his death . . . This [jury instruction] certainly would give the jury the right to consider the loss of the son as a *substantive* civil right loss to accrue to the parents. Such a right in the parents does not exist." 144 Mich App at 337-39. (Emphasis added.)

Petitioners themselves recognize that age does indeed matter.

Petitioners argue that age should be a factor in the determination of damages, presumably that the parents of an adult child should not receive as much money as the parents of a minor child. Pet. for Cert., at 10. The only possible reason for such distinction by Petitioners is that the parents of an adult child no longer raise and nurture that child. Petitioners' position is actually consistent with that of the Court of Appeals and Respondents that the parents of an *adult* child have no constitutional rights to the continued life of that child.

Further, Petitioners have never demonstrated why a distinction based on age violates the equal protection clause. Petitioners only argue about the existence of the right. Petitioners' argument is tantamount to saying that *any* distinction in a constitutional case is violative of the equal protection clause. This Court has never adopted such a position. See,

e.g., *Zablocki, Milwaukee County Clerk* v. *Redhail*, 434 US 374 (1978); see also Tussman and tenBroek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341 (1949).

II.

THIS HONORABLE COURT SHOULD NOT GRANT THE PETITION FOR CERTIORARI TO HEAR THE DIRECTED VERDICT ISSUE BECAUSE PETITIONERS NEVER RAISED THE DUE PROCESS ARGUMENT BEFORE THE MICHIGAN COURTS, BECAUSE THE COURT OF APPEALS' DECISION TO GRANT A DIRECTED VERDICT WAS A MATTER OF STATE LAW, AND BECAUSE THE COURT OF APPEALS REACHED THE PROPER RESULT.

A. This Court should not review whether the Michigan Court of Appeals' decision on the directed verdict issue violated the due process clause of the Fourteenth Amendment, as Petitioners did not previously raise the argument.

Petitioners also never argued in the state courts that the Court of Appeals' decision on the directed verdict issue violated their due process rights. Petitioners' Statement of the Case does not specify where, or how, the due process challenge to the directed verdict decision was raised and decided in the state courts. Petitioners never argued to the Court of Appeals that a decision by that Court to grant a directed verdict would violate the due process clause of the Fourteenth Amendment. (Plaintiff-Appellees' Cross-Appellants' Brief on Appeal.) Petitioners also did not argue such a position in their Application for Leave to Appeal to the Michigan Supreme Court or in their supporting Brief. This Court has no jurisdiction to review the decision here because the due process challenge was not previously made.

B. This Court should not review the Michigan Court of Appeals' directed verdict decision because such decision is strictly a matter of state law.

This Court has jurisdiction to review state court decisions only upon matters of federal law. 28 USC § 1257(3); *Hill*, 401 US at 805-806; *Bowe*, 233 US at 664-65. Where a state court decision invokes purely state law, this Court will not hear a petitioner's claim that the state court misapplied state law. The due process protections of the Fourteenth Amendment do not apply to such situations, *Beck*, 369 US at 554-55, because that amendment does not assure uniformity of decisions or immunity from judicial error. "[O]therwise, every alleged misapplication of state law would constitute a federal constitutional question." *Id* at 555.

In the instant case, as in *Beck*, this Court does not have jurisdiction to hear Petitioners' claim that the supposed misapplication of state law by the Michigan Court of Appeals violated the due process clause of the Fourteenth Amendment. Petitioners do not establish the existence of *any* constitutional issue with respect to the directed verdict decision.

Petitioners claim that the Michigan standard for appellate review of a trial court's decision on a Motion for Directed Verdict — that the evidence is to be considered in a light most favorable to the non-moving party — is "required" in Michigan and by the United States Constitution. Pet. for Cert., at 14. Petitioners do not, however, explain anywhere in the Petition how the United States Constitution "requires" a certain standard for review of directed verdicts.

Petitioners do not cite to any law that supports the idea that the directed verdict standard is constitutionally mandated. Petitioners claim that the "constitutional standard [was] established in Michigan by *Riste* v. *Helton*, 139 Mich App 404; 362 NW 2d 300 (1984)." Pet. for Cert., at 14. In *Riste*,

however, not once does the Court of Appeals mention "due process" or any other constitutional principles. The *Riste* Court, as well as every other court in the cases cited by Petitioners, treated the directed verdict standard as a matter of non-constitutional, state law. *Riste*, 139 Mich App at 410–11.

C. This Court should not review the decision of the Michigan Court of Appeals as that Court applied the proper standard of review for directed verdict motions and reached the correct result.

Under Michigan law, in reviewing the decision of a trial judge on a Motion for Directed Verdict, an appellate court must consider "all the evidence. . . in the light most favorable to [the non-moving party]." *Kupkowski* v. *Avis Ford, Inc.*, 395 Mich 155, 167; 235 NW 2d 324 (1975). The Court of Appeals properly applied the *Kupkowski* standard here in determining that the trial judge should have granted a directed verdict.

An appellate court properly may order that a directed verdict be entered and a jury verdict vacated when, as a matter of law, reasonable minds could not differ as to the conclusions drawn from the evidence. Contrary to Petitioners' apparent belief, the jury is not the inviolate decisionmaker in all cases. Petitioners seem to suggest that an appellate court may *never* reverse a jury verdict. Such a suggestion is without basis in Michigan law.

The cases cited by Petitioners support the rule that, in a proper case, an appellate court may order the entry of a directed verdict. In *Kupkowski*, cited by Petitioners as authority for the proper standard of review, the Michigan Supreme Court, after carefully reviewing the trial court record, affirmed the decision of the Court of Appeals to order the entry of a directed verdict for Defendant and to vacate a jury award of nearly $100,000. The Court stated:

> "We continue to endorse the proposition that appellate courts exercise considerable restraint in overruling jury determinations, *but also choose not to ignore our responsibility to insure that the quantum and sufficiency of direct and circumstantial evidence presented at trial permits juries to draw reasonable inferences which would support such determination. In this case, no such inference could reasonably be made.*" 395 Mich at 167-68. (Emphasis added).

Other cases cited by Petitioners similarly support the Court of Appeals' decision in the instant case.

In *Obey* v. *McFadden Corp.*, 138 Mich App 767; 360 NW 2d 292 (1984), *lv den.*, the Court of Appeals held that the trial judge erred in denying Defendant's Motion for Directed Verdict and Judgment Notwithstanding the Verdict. *Id* at 779-80. The Court consequently reversed a jury verdict of $35,000 for Plaintiff. *Id* at 781. Similarly, in both *Nelson* v. *Detroit Automobile Inter-Insurance Exchange*, 137 Mich App 226; 359 NW 2d 536 (1984), and *Ransford* v. *The Detroit Edison Co.*, 124 Mich App 537; 335 NW 2d 211 (1983), the Court of Appeals affirmed the decision of the trial court to grant a directed verdict.

Accordingly, an appellate court may, in a proper case, reverse *the decision of the trial judge* not to grant a directed verdict.[5] The instant action presented such a case for the Michigan Court of Appeals.

The Court, in reviewing the entire record in this case, *only* found evidence that Commander Arreola acted in good faith

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[5] Contrary to Petitioners' claims, the appellate court is *not* explicitly reversing the factual findings of the jury. Rather, the appellate court reviews the decision *of the trial judge* and determines whether, *at the point at which the motion was made*, sufficient evidence existed to send the issue to the jury. This does not constitute any invasion of the province of the jury, as such province did not exist in the first place. This also does not interfere with any constitutional right to trial by jury.

at all times during the confrontation with Ealey. The Court found that Arreola clearly acted in good faith when, looking down the barrel of Ealey's gun at close range, he fired upon Ealey in order to defend himself.[6] The Court also found that the evidence did not show any "bad faith attempt [by Arreola] to force Ealey into a fatal confrontation." 144 Mich App at 333. Arreola's decisions to enter the house and to open the door to the porch were good faith, practical attempts to resolve a hostile gunman situation. *Id.*

Petitioners do not demonstrate any evidence from which the jury could have found bad faith on the part of Commander Arreola. Petitioners' suggestion that the firing of five shots into Ealey constituted bad faith is without merit. See note 6, *supra*.

Petitioners' only other argument is that one member of the Court of Appeals' panel, Judge Roman S. Gribbs, was biased. Pet. for Cert., at 15. However, this Honorable Court has no jurisdiction to hear such complaint. Any bias or prejudice of a state judge is purely a matter of state law. Petitioners did not preserve such issue for this Court's consideration, in that they did not raise it before the Michigan Supreme Court, the proper repository for complaints about the biases of a state court

[6] In this regard, the jury found that Officer Fitzgerald had acted in good faith in shooting to defend Commander Arreola. As the Court of Appeals noted, the good faith of Arreola, who faced the gunman, is subject to even less scrutiny than that of Officer Fitzgerald. 144 Mich App at 333.

Petitioners suggest that Commander Arreola may have acted in bad faith in firing the fifth shot into Ealey. Pet. for Cert., at 15. Petitioners do not suggest how the firing of a fifth shot, within a second or two of the first, constitutes a "bad faith" action, especially when the firing of the first potentially fatal shot was in good faith. Nor do Petitioners suggest any difference in legal effect or outcome between the first four shots and the fifth shot. Finally, the jury found that Officer Fitzgerald had acted in good faith in firing *all six rounds from his revolver*. 144 Mich App at 333.

judge. In addition, Judge Gribbs concurred in the *result only*. 144 Mich App at 340. Finally, Petitioners have not shown any grounds for Judge Gribbs' alleged bias. Judge Gribbs was not a Police Commissioner at the time of the incident and he had been out of the Mayor's office for over five years when the shooting occurred.

CONCLUSION

For these reasons, this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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